COMMON LAW ROOTS OF THE MAJOR QUESTIONS DOCTRINE

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INTRODUCTION

The "major questions doctrine" (MQD) is one of the most prominent and controversial developments in American administrative law.[1] The Supreme Court in recent years has emphatically recognized and robustly applied the doctrine, under which an administrative agency claiming authority to make "major policy decisions" "must point to 'clear congressional authorization' for the power it claims."[2] This doctrine operates as a canon governing how to interpret statutes that delegate power to agencies.[3] Scholars and the Justices themselves debate whether the MQD is a clear statement rule substantive canon, or a descriptive canon.[4] On the clear statement rule view, the MQD requires agencies claiming authority to establish that their reading of the statute is not just the best reading but is *clearly* correct.[5] On the descriptive canon view, the importance of power allegedly granted does not trigger a rule-like clarity requirement, but importance is a relevant

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1 *See, e.g.*, Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899, 901–02 (2024).

2 *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 419–20 (D.C. Cir. 2017) (mem.) (Kavanaugh, J. dissenting from denial of rehearing en banc)); Nate Bartholomew, *Structural Implementation and The Major Questions Doctrine*, 47 HARV. J.L. & PUB. POL'Y 857, 863–71 (2024) (discussing two recent cases applying the MQD).

3 *See* Michael D. Ramsey, *An Originalist Defense of the Major Questions Doctrine*, 76 ADMIN. L. REV. 817, 818–20 (2024).

4 *See id.* at 820–22 (describing the difference between these two categories of canons).

5 *See, e.g.*, *West Virginia*, 142 S. Ct. at 2616–17 (Gorsuch, J., concurring).

contextual clue to a statute's meaning because reasonable interpreters generally expect important powers to be granted clearly.[6]

Most scholars agree that the MQD—whether substantive or descriptive—has a weak historical foundation.[7] They maintain that the doctrine emerged in Supreme Court precedents dating back to the 1980s at the earliest.[8] Indeed, many criticize the MQD as simply "made up" to serve anti-regulatory purposes.[9] This criticism has particular force for a Court that professes judicial restraint and commitment to originalism, because making up new doctrines to achieve desired outcomes is neither restrained nor originalist. Several originalist scholars have pointed this out and rejected the MQD as illegitimate.[10]

Other scholars, however, have defended the MQD's historical pedigree, arguing that the MQD has early antecedents.[11] Louis Capozzi has argued that a substantive, clear-statement-rule version of the MQD traces back to the "mid-nineteenth century,"[12] when courts applied a "presumption against implied delegations by legislatures."[13] Capozzi points to a notable example in 1897 where the Supreme Court required clear statutory authorization for the Interstate Commerce

6 *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2378–80 (2023) (Barrett, J., concurring); Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909, 916 (2024) ("[O]rdinarily, lawmakers and private parties tend to speak clearly, and interpreters tend to expect clarity, when those lawmakers or parties authorize others to make important decisions on their behalf.").

7 *See, e.g.*, Levin, *supra* note 1, at 947–55 (arguing the MQD has little precedential or historical support).

8 *See, e.g.*, Cass R. Sunstein, *It All Started with Benzene*, 76 ADMIN. L. REV. 673, 674–75 (2024) ("The Benzene Case [decided in 1980] is now understood to be the first appearance of the Major Questions Doctrine.").

9 *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2400 (2023) (Kagan, J., dissenting).

10 *See* Note, *The Compatibility of Substantive Canons and Originalism* 139 HARV. L. REV. 625, 642–43 (2025) (arguing the MQD "significantly postdated ratification" and thus conflicts with originalism); Ramsey, *supra* note 3, at 819 n.5 (collecting other originalist critics). Professor Michael Ramsey, however, has defended the MQD on originalist grounds, even assuming it is a modern invention, arguing that "the judicial power" authorizes courts to develop new canons that underenforce statutes in service of core founding-era values. *See id.* at 820. Taking a different angle, several thoughtful student notes have recently defended a modest, contextual substantive canon MQD as consistent with textualism, in which case (at least if textualism is permitted by the original meaning of Article III), the MQD would be consistent with originalism. *See* Thomas MacPhee, Note, *The Textualist Basis for Substantive Canons*, 100 NOTRE DAME L. REV. REFLECTION 291 (2026); Jonathan Meilaender, Note, *Structural Textualism and Major Questions*, 48 HARV. J.L. & PUB. POL'Y 369 (2025).

11 *See* Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO STATE L.J. 191, 196–208 (2023) [hereinafter *Past and Future*]; Louis J. Capozzi III, *In Defense of The Major Questions Doctrine*, 100 NOTRE DAME L. REV. 509, 517–18, 547–48 (2025) [hereinafter *Defense*]; Wurman, *supra* note 6, at 964–77.

12 Capozzi, *Defense*, *supra* note 11, at 517.

13 Capozzi, *Past and Future*, *supra* note 11, at 200.

Commission to exercise the important power of setting rates prospectively.[14] Capozzi notes in passing that courts "seemingly borrowed this rule from [the] analogous context [of] delegations from state governments to municipalities," where courts also "demanded an 'express grant' of authority from the legislature."[15] This refers to Dillon's Rule (discussed further in Section III.A), which was "an interpretive presumption dating from the nineteenth century that directs courts to read state grants of authority [to municipalities] narrowly."[16]

Professor Ilan Wurman has argued that the descriptive version of the MQD has robust historical support, citing early examples from statutory and constitutional interpretation and the common law of agency.[17] For example, early Anglo-American agency law contained the rule that "'[s]ubordinate' powers can be left to implication, but 'principal' powers cannot be."[18] In other words, principal powers had to be expressly delegated. For this rule, Wurman cites several early cases and Justice Joseph Story's seminal 1839 treatise on agency law.[19] Wurman's discussion is fairly brief, though (spanning only four pages), and he makes no argument that this agency doctrine is the origin of any binding statutory interpretation rule.[20] For him, this agency doctrine is simply one illustrative example that reasonable interpreters generally expect important powers to be granted clearly.[21] Capozzi has briefly referenced Wurman's explanation of this agency law rule without elaborating upon it, and Capozzi does not connect it to Dillon's Rule or the public law presumption against implied delegations that he describes.[22]

Just a few months ago, Justice Gorsuch added an important contribution to the debate over the MQD's historical pedigree in his

14 *See* Capozzi, *Past and Future*, *supra* note 11, at 203–05 (2023) (citing *Interstate Com. Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 167 U.S. 479 (1897)).

15 Capozzi, *Defense*, *supra* note 11, at 517 (first citing *City of St. Paul v. Laidler*, 2 Minn. 190, 203 (1858), and then citing Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 826–27 (2020)); *see id.* at 517 n.26 (referencing Dillon's Rule); Capozzi, *Past and Future*, *supra* note 11, at 200 n.61 (referencing the substance of this rule without using the label Dillon's Rule).

16 Evan C. Zoldan, *The Major Questions Doctrine in the States*, 101 WASH. U. L. REV. 359, 413 (2023).

17 *See* Wurman, *supra* note 6, at 916, 964–77.

18 *Id.* at 968.

19 *See id.*

20 *See id.* at 968–71 (discussing agency law foundations for a descriptive importance canon); *id.* at 972 n.330 (noting Dillon's Rule but not viewing it as relevant to the MQD).

21 *See id.* at 916.

22 *See* Capozzi, *Defense*, supra note 11, at 547–48 (referencing Wurman's work); *id.* at 517 & n.26 (referencing Dillon's Rule as being the source of a presumption against implied delegations to administrative agencies but not connecting Dillon's Rule with the older agency law origin); Capozzi, *Past and Future*, supra note 11, at 207 (same).

concurrence in *Learning Resources, Inc. v. Trump*, the case challenging President Trump's authority to impose wide-ranging, major tariffs.[23] Justice Gorsuch argued that several early bodies of law contained precursors of the MQD: the common law of corporations,[24] the common law of agency,[25] and law governing executive officials.[26] Justice Gorsuch's discussion collected the earliest evidence published to date of the MQD's antecedents, but his discussion is still brief (also spanning only four pages).[27]

This Note argues that Wurman, Capozzi, and Justice Gorsuch are correct that these doctrines are antecedents of the MQD. This Note contributes to the conversation in two ways. First, it compiles additional evidence that Wurman, Capozzi, and Justice Gorsuch are correct that a clarity rule for extraordinary powers existed in each of the early Anglo-American bodies of law they identify. Second, this Note argues that these clear statement rules in these disparate fields of law, while ostensibly separate and unrelated, actually reflect the same identical rule barring implied delegation of principal powers. This rule appears to have originated in the common law of agency and was applied to public law agency relationships, including municipal corporations and later administrative agencies. To unearth this connection and explain how this provides historical precedent for the MQD, this Note explains more fully the content of the agency rule requiring express delegation of principal power and traces how that rule was applied to public law delegations of power.

Part I, anticipating the objection that agency law is not relevant to statutory interpretation, argues that applying interpretive rules from the common law of agency to statutory interpretation is theoretically sound and in fact historically occurred. Part II, building off Wurman's work, argues that early American agency law contained a rule very similar to the MQD, requiring principals to be explicit when giving an agent important authority. Specifically, Part II.A argues that "principal" powers had to be delegated expressly, while less important or "incidental" powers could be delegated implicitly. Part II.B argues this rule was applied especially strictly for powers that were unusually dangerous for the principal's interests. Part III argues that this rule was applied to statutory interpretation, concerning statutes delegating

23 Learning Resources, Inc. v. Trump, 146 S. Ct. 628 (2026).

24 *Id.* at 650–52.

25 *Id.* at 652.

26 *Id.* at 652–53.

27 *See id.* at 650–53. This Note does not further discuss Justice Gorsuch's analysis in *Learning Resources*, since his opinion came out after this Note was submitted for publication, but the evidence he identifies and the evidence identified in this Note strongly corroborate each other.

power in public agency relationships. For example, Dillon's Rule barred implied delegations of principal power to municipalities as agencies of the state. Capozzi's work indicates that another nineteenth-century rule required the same thing for the early prototype administrative agencies. Both rules reflected the exact same substance and even verbiage as the agency rule, indicating that they originated from it. But even if these statutory interpretation rules were not drawn from the law of agency, they provide independent evidence that courts traditionally required important power to be granted clearly.

This historical evidence indicates that the MQD has a better historical basis than previously recognized. At minimum, this would corroborate Wurman's argument that, as a purely descriptive matter, it is reasonable to expect more clarity for delegation of important power. More ambitiously, this Note indicates that this "importance canon"[28] was not just a contextual expectation but an actual rule of interpretation applied to statutes delegating power.

I. The Common Law of Agency is Relevant to Statutory Interpretation

At the outset, one could object that rules from the common law of agency governing how to interpret agency instruments are not relevant to public law statutory interpretation and thus cannot be historical foundation for the MQD. This Part offers two responses, one theoretical and one related to historical practice.

First, theoretically, interpretive rules from the common law of agency are relevant to statutory interpretation to the degree statutes are agency instruments. The context of private agency relationships certainly has differences from the context of public agency relationships. Private agencies, for instance, may not raise due process or separation of powers concerns in the same way public agencies do. But the two contexts remain very similar. Agency law is largely comprised of rules for determining whether, how, and to what extent power can be and has been delegated. Much of American public law is that same enterprise. Indeed, Professors Gary Lawson and Guy Seidman have argued that the Constitution—as an instrument delegating power from the People to government—"is *best* understood as some kind of agency or fiduciary instrument."[29] Statutes vesting administrative agencies with power are also, at least substantially, agency instruments. It is commonplace (across the ideological spectrum) to describe such statutes

28 *See* Wurman, *supra* note 6, at 949 (calling the descriptive MQD by this name).

29 Gary Lawson & Guy Seidman, "A Great Power of Attorney": Understanding the Fiduciary Constitution 76 (2017) (emphasis added).

as Congress *delegating* power.[30] For example, the Supreme Court in *Loper Bright Enterprises v. Raimondo* stated that sometimes "the best reading of a statute is that it *delegates* discretionary authority to an agency."[31] Similarly, the major questions case *West Virginia v. EPA* stated that for major questions, an agency can only act "pursuant to a clear *delegation* from [Congress]."[32] And the Supreme Court long ago recognized that administrative agencies are agents of the legislature. *St. Joseph Stock Yards* held that Congress can "appoint[] an *agent* to act within [the ratemaking] sphere of legislative authority" and "endow the *agent* with power . . . , provided the requirements of due process which are specially applicable to such an *agency* are met."[33] The very name administrative *agency* drives this home.

For the aspects in which instruments delegating power are different in the public and private agency contexts, each context might have certain unique interpretive rules, and the interplay of the various applicable rules could be different. But it is hard to see why generally applicable agency law principles used to interpret delegations of power would have no relevance to interpreting that exact topic—delegations of power—in public law agency instruments. As Lawson and Seidman have argued, the interpretive rules for private law agency instruments "provide, at the very least, a vector—a force with both direction and magnitude—for discerning the Constitution's meaning."[34] The same would be true for a statute as an instrument delegating power.

Regardless of this theoretical debate, as a matter of historical practice, interpretive rules were not hermetically sealed into different public law versus private law categories. To give just one example from the early American republic of the general applicability of sound interpretive rules, Theodore Sedgwick's 1857 treatise on constitutional and statutory interpretation cited Justice Joseph Story's seminal treatise on constitutional interpretation as recognizing that "maxims which have found their way not only into judicial discussions but into the business

30 *See, e.g.*, Adrian Vermeule, *Implied Delegations After* Loper, YALE J. ON REGUL.: NOTICE & COMMENT (July 9, 2024), [https://perma.cc/7Y2T-AY6W] (arguing that Congress should be able to delegate power expressly and also implicitly); JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 522 (4th ed. 2021) ("Congress frequently enacts statutes that *delegate* to administrative agencies . . . ." (emphasis added)).

31 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024) (emphasis added).

32 West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (emphasis added).

33 St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51 (1936) (emphasis added).

34 LAWSON & SEIDMAN, *supra* note 29, at 77.

of common life, as founded in common sense and common convenience, are applicable to the construction of the Constitution."[35]

More specifically, scholars have thoroughly documented how the founding generation frequently discussed government in agency terms.[36] To give just one of countless examples, James Madison wrote in *The Federalist No. 46* that the federal and state governments are but "different agents and trustees of the people, instituted with different powers, and designated for different purposes," with the "ultimate authority . . . resid[ing] in the people alone."[37] In other words, "We the People," as the principal, delegated power through the Constitution to an agent (Congress). Congress then, in giving power to other entities (administrative agencies, for example), would technically be *sub*-delegating power to a *sub*-agent.[38]

Some have objected that this agency language regarding government was rhetorical, not legally binding.[39] But the historical record at least partially refutes this view. For example, several scholars have concluded that the constitutional nondelegation doctrine stems substantially from an established agency law rule,[40] and the Supreme Court agreed in the landmark nondelegation case *J. W. Hampton, Jr., & Co. v. United States*.[41] In the Court's words, the nondelegation rule "applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law."[42]

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35 THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 588 (N.Y.C., John S. Voorhies 1857) (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 448 (Bos., Hilliard, Gray & Co. 1833)).

36 *See, e.g.*, 1 STORY, *supra* note 35, § 382 (saying that the People were the parties to the social contract of the Constitution and delegated the powers in it to government); *id.* § 413 (saying government exercises delegated powers as the "temporary servants and agents" of the people); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RSRV. L. REV. 243, 273–74 (2004); LAWSON & SEIDMAN, *supra* note 29, at 31–37; CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT 157 (1994); Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 BAYLOR L. REV. 152, 170 n.81 (2023).

37 THE FEDERALIST NO. 46, at 243 (James Madison) (George W. Carey & James McClellan eds., 2001).

38 *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 198 (9th ed. 2022).

39 *See, e.g.*, Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1483–84 (2020).

40 *See* LAWSON & SEIDMAN, *supra* note 29, at 112–15; Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 750 n.109, 758–59, 770 (2019); Gordon, *supra* note 36, at 168–71 (2023); SOTIRIOS A. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 26–27 (1975).

41 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 405–06 (1928).

42 *Id.*

If an agency law rule governed *when* power could be delegated to administrative agencies at all, it would be perfectly natural for agency law to also govern the *manner* in which it could be delegated, which is what the MQD does in requiring that important power be delegated clearly. Beyond this general case for the relevance of agency law, the rest of this Note argues that an agency rule against implied delegation of principal power was historically applied to interpreting delegations of power in statutes.

II. HISTORICAL ANTECEDENTS TO THE MAJOR QUESTIONS DOCTRINE IN THE COMMON LAW OF AGENCY

Under traditional agency doctrine for delegations of power, the starting point is that "[t]he bedrock obligation of the eighteenth-century agent was to act only within granted authority."[43] The same rule is well established for governmental agencies. Since agencies are creatures of statute, they have no power unless Congress grants it to them.[44] Professor Emily Bremer has noted that the temporary reign of *Chevron* deference flipped this traditional "presumption that agency action is invalid if not *authorized* by statute to a presumption that agency action is valid if not clearly *prohibited* by statute."[45] *Loper Bright*'s overruling of *Chevron* would seem to return us to the status quo ante.[46] Professor Adrian Vermeule has even suggested that *Loper Bright* could be read to bar *any* implied delegations to agencies, though he argues against that reading.[47] The MQD charts a middle course, barring implied delegation of "major" powers, while allowing implied delegation of non-major powers.[48]

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43 *See* LAWSON & SEIDMAN, *supra* note 29, at 81 (footnote omitted).

44 *See* Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, HOOVER INST. 9 n.67 (Nov. 13, 2023), [https://perma.cc/4KU2-NFA2] [hereinafter *Right Diagnosis*] (collecting caselaw for this proposition); THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 20 (2022). *See also Creature of Statute*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "creature of statute" as "[a] doctrine, government agency, etc. that would not exist but for a legislative act that brought it into being").

45 Emily S. Bremer, *Power Corrupts*, 41 YALE J. ON REGUL. 426, 459 (2024) (emphases added).

46 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

47 *See* Vermeule, *supra* note 30.

48 *See* Merrill, *Right Diagnosis, supra* note 44, at 11–12 ("The major questions doctrine is effectively a reverse-*Chevron* doctrine for whatever qualifies as a major question. *Chevron* says courts must accept plausible agency interpretations of the statute they administer if the statute is unclear; the major questions doctrine says courts must *reject* agency interpretations if the statute is unclear.").

This Part argues that early American agency law supports this middle course, containing rules that essentially required that important power be delegated clearly. Section II.A argues that agency law in the early American republic required delegations of power in formal written agency instruments to be strictly construed—i.e., principal powers had to be granted expressly, while incidental powers could be implied. Section II.B argues that at least as early as the late nineteenth century, this rule was pursued even more strictly for unusually dangerous powers. In one court's words, "clear evidence" was required that the dangerous power was authorized.[49] This history indicates that doctrines very like the MQD prevailed in early American law for interpreting delegations of authority.

A. The Agency Rule Against Implied Delegation of Principal Powers for Formal Written Instruments

In the Founding period, grants of authority in formal written agency instruments were strictly construed.[50] A prominent example of such a formal written instrument was a power of attorney.[51] Agents whose authority was created by such an instrument had no authority beyond that expressly given by the instrument or implied as necessary and proper to carry out an expressly given power. This rule appears to have been a well-established rule throughout American history, held as the rule in many states,[52] and the rule appears to persist today.[53] This rule is particularly relevant to public law interpretation because agency instruments like powers of attorney are so similar to public law

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49 Guar. Bank & Tr. Co. v. Beaumont Cadillac Co., 218 S.W. 638, 643 (Tex. Civ. App. 1920).

50 *See* THE ATTORNEY'S COMPLEAT POCKET-BOOK 145 (Dublin, James Williams 1772) (saying "authorities of this kind receive a very strict interpretation as to the conduct of agents"); 1 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 458 (1780) ("An authority ought to be strictly pursued"); Robert G. Natelson, *Legal Origins of the Necessary and Proper Clause*, *in* GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 52 (2010) ("A fiduciary's authority was said to be construed strictly; but to effectuate the intent of the persons who granted it, that authority also included incidental powers." *Id.* at 57); JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 68 (Bos., Charles C. Little & James Brown 1st ed. 1839) [hereinafter AGENCY]. Story's next edition in 1844 states the same rule, changing only the word "construction" to "interpretation." *See* JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 68 (Bos., Charles C. Little & James Brown, 2d ed. 1844).

51 *See* STORY, AGENCY, *supra* note 50, §§ 67–68.

52 *See* Ralph W. Stultz, Comment, *Construction of Written Powers of Attorney*, 18 OHIO ST. L.J. 129, 129 & n.4, 130–31 (1957) (cataloguing that American courts followed the strict construction principle).

53 *See* 3 AM. JUR. 2D *Agency* § 24, Westlaw (database updated May 2025) ("Generally, a power-of-attorney instrument must be strictly construed."); RESTATEMENT (THIRD) OF AGENCY § 2.02, cmt. c, reporter's note d (A.L.I. 2006).

instruments such as the Constitution and statutes, which delegate certain limited powers for specific purposes.[54] Professors Lawson and Seidman argue that this similarity makes the background interpretive rules for powers of attorney particularly applicable to the public law context.[55] While statutes are in some respects different than the Constitution, they are similarly formal written instruments delegating power to certain entities for specified purposes.[56]

Justice Joseph Story gave a good statement of this strict construction rule in his seminal treatise on agency law in 1839. Justice Story wrote that "formal instruments of this sort are ordinarily subjected to a strict construction, and the authority is never extended beyond that, which is *given in terms*, or is *necessary and proper for carrying the authority so given into full effect*."[57] Englishman William Paley's early nineteenth-century treatise on agency law states precisely the same rule, with perhaps even a slightly stricter flavor. In his words, "all written powers, such as letters of attorney, or letters of instructions, receive a strict interpretation; the authority never being extended beyond that which is *given in terms*, or is *absolutely necessary* for carrying the authority so given into effect."[58]

This rule polices the scope of an agent's power by specifying how authority can be granted in an agency instrument. The rule is broadly stated, and applies to any grant of authority in a formal written agency instrument. Authority must be granted expressly (i.e., "given in terms"), with the caveat that power can be implied if "necessary and proper" to carry out an authority that *was* expressly given. To frame the matter from the agent's perspective, an agent claiming a power had to point to express authorization in the instrument, or the power had to be "necessary and proper" to carry out a power that the agent *was* expressly given.

54 *See* LAWSON & SEIDMAN, *supra* note 29, at 49–76; *see also* Gary Lawson, *A Private-Law Framework for Subdelegation*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 123, 130 (Peter J. Wallison & John Yoo eds., 2022).

55 *See* LAWSON & SEIDMAN, *supra* note 29, at 76–78.

56 *See* LAWSON, *supra* note 38, at 198 (suggesting that statutes subdelegate power to agencies).

57 STORY, AGENCY, *supra* note 50, § 68 (emphases added).

58 WILLIAM PALEY, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT 83 (J.H. Lloyd ed., Phila., 2d Am. ed. Littell 1840) (emphases added). I should note that Paley's 1812 edition's section on this same topic does not appear to state this rule. *See* WILLIAM PALEY, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT 137–39 (London, Butterworth 1812). I am not sure if that is because the law changed between 1812 and 1840, or simply because his 1812 edition did not specifically discuss formal written instruments in as much detail, with more added in his 1840 edition.

"Necessary and proper" is a phrase of course familiar to modern eyes from the Constitution's Necessary and Proper Clause.[59] But the Constitution did not invent this phrase. In fact, "necessary and proper" was common language in agency instruments in that era.[60] The phrase was familiar shorthand for denoting "incidental" power,[61] and the distinction between "incidental" powers and "principal" powers (or "principals" and "incidents") was a prominent feature of agency law.[62]

Principal powers were the main substantive powers granted to an agent, while incidental power was the means necessary to execute the principal powers. As Professors Lawson and Seidman describe it, an "agent's expressly granted powers, which formed the object of the agency relationship, were the principal powers," and "the implicit authority that presumptively accompanied those grants was known as *incidental* power."[63] For example, Samuel Livermore's 1818 treatise on agency stated that "[a]ll [incidental] powers, which are *necessary to carry into effect* the principal authority, are included in the grant of such principal authority."[64] This rule that incidental powers implicitly accompanied express principal powers is why both James Madison and Alexander Hamilton in *The Federalist* argued that the Constitution's Necessary and Proper Clause was technically unnecessary and included only from an abundance of caution.[65]

The term "necessary" of course has a range of meaning, but Lawson and Seidman write that the term had an established meaning in this context: A power or right was "necessary" if it (1) was indispensable, (2) its absence would seriously impair the principal, or (3) it customarily accompanied the principal.[66]

59 *See* U.S. CONST. art. I, § 8, cl. 18.

60 *See* LAWSON & SEIDMAN, *supra* note 29, at 80–81; Wurman, *supra* note 6, at 968 n.301 (noting scholars connecting the clause to agency law).

61 *See* Lawson, *supra* note 54, at 143; LAWSON & SEIDMAN, *supra* note 29, at 84–85.

62 Lawson and Seidman spend a whole chapter explaining this doctrine. *See* LAWSON & SEIDMAN, *supra* note 29, at 76–103.

63 *Id.* at 19, 82. Professor Wurman also discusses this briefly. *See* Wurman, *supra* note 6, at 968.

64 1 SAMUEL LIVERMORE, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT AND OF SALES BY AUCTION 105 (Balt., Robinson 1818) (emphasis added). Livermore used the terminology "medium powers" instead of "incidental powers," but that terminology meant the same thing. *See* LAWSON & SEIDMAN, *supra* note 29, at 83.

65 *See* THE FEDERALIST NO. 33, at 158–59 (Alexander Hamilton) (George W. Carey and James McClellan eds., 2001) (saying the Clause's import "would have resulted by necessary and unavoidable implication from the very act of . . . vesting [a government] with certain specified powers"); NO. 44, at 234–35 (James Madison) (stating that even without the Clause, "all the particular powers requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication").

66 *See* LAWSON & SEIDMAN, *supra* note 29, at 83.

The distinction between incidental and principal powers explicitly involved the importance of the power. In addition to being necessary to execute a principal power, an incidental power was inferior to and less important than the principal power to which it was incidental. As Lawson and Seidman describe, principal powers were "great substantive and independent power[s]."[67] An incident, on the other hand, "to persons in the founding era, was 'a thing necessarily depending upon, appertaining to, or following another thing that is more worthy or principal.'"[68] In Professor Robert Natelson's words, "[a]n incident was always subordinate to or dependent on the principal. . . . [A]n incident could not comprise a subject matter independent of its principal[,] nor could it change the nature of the grant."[69] Putting it another way, Natelson observed that an incident was "*less important* or less valuable than its principal."[70] Much more could be said to flesh out the precise contours of "principals" versus "incidents," but a summary is that an incidental power had to be less important than its principal and necessary to carry that principal into effect.[71]

Justice Story and Paley's descriptions of the strict construction rule for formal written agency instruments reflect this principal versus incident distinction. As Justice Story wrote, an agent's authority was limited to what was "*given in terms*, or is *necessary and proper for carrying the authority so given into full effect*."[72] In other words, *incidental* power could be delegated *implicitly*, but any other power (i.e., principal power) had to be delegated *expressly*.

This rule markedly resembles the MQD's two key features that (1) major powers must be (2) clearly authorized. First, the line between principal and incidental is substantially a line between major and non-major powers. Second, the agency rule requires that principal power (i.e., the major powers) be given expressly, while incidental power (i.e., minor powers) need not be given expressly. Major power requires express authorization; minor powers do not. In addition to the substance of this agency rule, the rule's rationale seems to apply to public law instruments delegating power. The agency law rationale was that the formality of formal written instruments gave rise to a

67 *Id.* at 88 (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 411 (1819).

68 *Id.* at 82 (quoting Giles Jacob, *Incident*, A NEW LAW DICTIONARY (10th ed. London, Strahan & Woodfall 1782)).

69 Natelson, *supra* note 50, at 61–62 (citation omitted).

70 *Id.* at 61 (emphasis added); *see also* New Orleans Pac. Ry. Co. v. Parker, 143 U.S. 42, 55 (1892) ("The word 'appurtenant,' as ordinarily defined, is that which belongs to or is connected with something else, to which it is subordinate or less worthy, and with which it passes as an incident . . . .").

71 *See* LAWSON & SEIDMAN, *supra* note 29, at 76–103 (citing scholars further discussing the meaning of "principal" versus "incident").

72 STORY, AGENCY, *supra* note 50, § 68 (emphases added).

presumption that care was taken in drafting and that the instrument embodied the entire intent of the principal.[73] The same logic applies with equal force to statutes, which are among the most formal legal instruments imaginable. At the least, this agency law rule links the importance of power and the level of clarity required for authorizing that power. The more important a power was, the more likely it seems that it would be considered a principal power that had to be given expressly.

B. The Agency Rule That Dangerous Powers Must be Clearly Authorized

Traditional agency law also contained a rule requiring that delegations of especially risky or unusual power be clear. One example is the power to borrow money.[74] This is a dangerous power because it can put the principal on the hook for potentially ruinous financial obligations. The rule instructed that "dangerous powers" like this "will not be inferred unless it is reasonably clear that this was intended."[75] As one court put it most succinctly, "[p]ower to borrow money is not to be inferred without *clear evidence* of such grant."[76] This doctrine goes back at least as early as 1815,[77] and courts have continued to apply the rule in the modern era.[78] The earliest case my limited research uncovered stating this rule was from Massachusetts's highest court in 1815. There, an agent was expressly given power to buy and sell goods, and the court would not from that express power imply a power to give subagents authority to make promissory notes (i.e., to buy *on credit*).[79] This was partly because power to make promissory notes, the court stated, "may be *dangerous.*"[80] "It would be difficult to limit such transactions

73 *See* RESTATEMENT (FIRST) OF AGENCY § 34 cmt. f (A.L.I. 1933); RESTATEMENT (SECOND) OF AGENCY § 34 cmt. h (A.L.I. 1958).

74 *See* RESTATEMENT (SECOND) OF AGENCY § 34 cmt h. (A.L.I. 1958) (naming "the power to borrow money" as an example of a "dangerous power[]").

75 *Id.*

76 Guar. Bank & Tr. Co. v. Beaumont Cadillac Co., 218 S.W. 638, 643 (Tex. App. Ct. 1920); *see also* 2A C.J.S. *Agency* § 192, Westlaw (database updated May 2025) ("Potentially hazardous powers, such as the power to borrow money on behalf of the principal, cannot be inferred from a power of attorney; it must be reasonably clear that the principal intended to grant such power.").

77 *See* Emerson v. Providence Hat Mfg., 12 Mass. 237, 242–43, 11 Tyng 244, 249–50 (1815).

78 *See, e.g.*, Gagnon v. Coombs, 654 N.E.2d 54, 63 (Mass. App. Ct. 1995) ("[P]owers of attorney are to be strictly construed to require explicit, and not inferential, grants of 'dangerous' agency authority the exercise of which is potentially destructive of the principal's interests.").

79 *See Emerson*, 12 Mass. at 241–42.

80 *Id.* (emphasis added). The other reason the court cites is that making promissory notes would not be "necessary" to carry out the task of buying/selling. *Id.* at 242. This case

to cases beneficial to the company," the court wrote, "and it would be unreasonable to commit their whole interest into the hands of a multitude of inferior agents, when they had appointed a principal one, in whom they had reposed all their confidence."[81] The magnitude of the principal's interest at stake and the hazardous nature of the power thus played a key role in the court refusing to imply the power to make promissory notes. This authority had to be *expressly* given.[82] In sum, an especially important and risky power for the principal's interests required express authorization.

This special reluctance to imply dangerous powers, like the power to borrow money, seems to have been broadly accepted and well-recognized by the end of the nineteenth century.[83] Iowa's supreme court in 1920, for example, called it "well settled as a cardinal rule."[84] Floyd Mechem, the leading agency law authority of that era, stated the same rule in his preeminent 1914 treatise.[85] Referring to the power to make promissory notes, Mechem wrote that "[a] power so *perilous* is not to be implied from acts which, in other matters less *hazardous*, might create an agency. It must be conferred in *express* terms, or be necessarily and *inevitably* inferable from the very nature of the agency actually created."[86]

This requirement that a dangerous power be "express, or necessary" is very similar to the rule discussed in Section II.A that a principal power must be express but an incidental power (i.e., one necessary to carry out an express principal power) could be implied. But here, in this context of dangerous powers, the necessity showing is more demanding. Dangerous powers, Mechem says, must be "*inevitably*

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could thus be read as reflecting a straightforward application of the rule discussed in Section II.A above allowing only incidental power to be implied, but the court also relies on the dangerousness of sub-agents having power to pledge the credit of the principal. If nothing else, the dangerousness of the power is a background factor worrying the court. *Id.*

81 *Id.*

82 *Id.*

83 *See* FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 399 (Chi., Callaghan & Co. 1889) (saying the power to borrow money would not be inferred unless "absolutely required" and "practically indispensable"). Mechem's second edition of his treatise from 1914 elaborated on this rule, citing several cases from the 1890s. *See* 1 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 1001 (2d ed. 1914) [hereinafter AGENCY 2D].

84 Isaac & Co. v. J.R. Lindsey & Co., 176 N.W. 950, 952 (Iowa 1920).

85 Illustrating Mechem's stature, the American Law Institute chose Mechem as the Reporter of the First Restatement of Agency (completed after his death), for he was "acknowledged . . . as the 'one person preeminently fitted' for that role." Deborah A. DeMott, *The Contours and Composition of Agency Doctrine: Perspectives from History and Theory on Inherent Agency Power*, 2014 U. ILL. L. REV. 1813, 1819 (2014).

86 MECHEM, AGENCY 2D, *supra* note 83, § 1001 (emphasis added); *see also id.* ("[A]uthority to borrow money . . . is one reluctantly to be implied.").

inferable."[87] In the words of New York's highest court in 1887, the power to make promissory notes "must be *practically indispensable* to the execution of the duties really delegated[] in order to justify its inference from the original employment."[88] The 8th Circuit in 1909 put it similarly, saying that if there is no express authority, "the very nature of the business to be transacted by the agent must *require* the exercise of *such extraordinary authority*."[89] Many other cases from that time stated the same principle.[90]

This rule that dangerous powers can only be implied if shown to be "inevitably inferable" or "practically indispensable" is a higher bar than merely "necessary and proper," putting a heavier burden on the party alleging the agent had these dangerous powers. This rule thus significantly decreases the likelihood that a dangerous power could be implied. This "dangerous powers" rule thus seems to be something of a carve-out from the rule discussed in Section II.A, or perhaps an especially strict application of it. The following illustration might help explain this. The rule described in Section II.A created two buckets of powers: (1) principal powers (which must be express) and (2) incidental powers (which can be implied). This "dangerous powers" rule creates a third bucket: powers that could fairly be thought necessary to execute an expressly granted power (and thus ordinarily would fall in bucket two and could be implied) yet do not rise to the level of *indispensably* necessary and cannot be implied because they are especially dangerous. Dangerous powers that were shown to be indispensably necessary would essentially fall into the normal second bucket of powers that can be implied. To put it another way, these dangerous powers that fall in the third bucket are treated the same as principal powers: both must be expressly given. The result is a higher likelihood that hazardous powers would have to be authorized expressly. Indeed, it

87 *Id.* (emphasis added).

88 Bickford v. Menier, 14 N.E. 438, 442 (N.Y. 1887) (emphasis added).

89 Chi., Rock Island & P. Ry. Co. v. Chickasha Nat'l Bank, 174 F. 923, 929 (8th Cir. 1909); *see also* Am. Nat'l Bank v. Bartlett, 40 F.2d 21, 24 (10th Cir. 1930).

90 *See, e.g.*, Isaac & Co. v. J.R. Lindsey & Co., 176 N.W. 950, 952 (Iowa 1920) (saying authority to borrow money is "one of the most *dangerous* powers" and thus "in the absence of express proof will not be implied unless it be a *necessary and inevitable inference* from the very nature of the agency created" (emphasis added)); Exch. Bank v. Thrower, 45 S.E. 316, 316 (Ga. 1903) ("*A power so perilous* [as borrowing money] is not to be implied from acts which in other matters *less hazardous* might create an agency. It must be conferred in *express* terms, or be necessarily and inevitably inferable from the very nature of the agency actually created." (emphasis added) (citations omitted)); Brannen v. State Exch. Bank, 180 N.W. 886, 888 (Iowa 1921); Madill Oil & Cotton Co. v. City Nat'l Bank, 193 P. 878, 880 (Okla. 1918); Benedictine Soc'y. v. Nat'l City Bank of N.Y., 109 F.2d 679, 682 (3d Cir. 1940); Waller v. Georgetown Nat'l Bank, 87 S.W.2d 924, 926 (Ky. 1935); Butts v. Ajax-Grieb Rubber Co., 155 S.W. 837, 839 (Mo. Ct. App. 1913); Jackson v. Nat'l Bank of McMinnville, 20 S.W. 802, 803 (Tenn. 1893).

would hardly make sense otherwise, since the whole concern behind the dangerous powers rule is that "such extraordinary authority" involves special dangers to the principal's interests, so courts were especially cautious that the principal really authorized it.[91] In sum, courts were reluctant to imply dangerous powers.

This reluctance to imply power which was "extraordinary" or "dangerous" parallels the MQD, which posits that agencies must point to clear authority to exercise power that is "extraordinary," "broad and unusual," or "highly consequential."[92] The scope of this dangerous powers rule could be debated (i.e., whether there were many different "dangerous" powers or only a small set). The rule seemed to include at least, in addition to the power to borrow money, the power to make gifts from the principal's assets,[93] and the power to confess judgment.[94] Regardless how broadly the rule applied, the rule clearly links the consequentialness of a power and the clarity required for its delegation. If nothing else, this "dangerous powers" rule reflects that concern about a power's dangerousness is relevant background context in evaluating grants of authority. Courts expected to see dangerous powers granted with greater clarity than typical powers.

III. THE AGENCY RULE AGAINST IMPLIED DELEGATION OF PRINCIPAL POWERS AS APPLIED IN TRADITIONAL STATUTORY INTERPRETATION

This Part argues that the rule against implied delegation of principal powers which operated in the common law of agency was also applied in statutory interpretation. This Part describes two examples of this. First, Section III.A describes Dillon's Rule, which was a rule against implied delegations of principal power to municipalities. Second, Section III.B discusses a rule against implied delegations of principal power to other public agencies. Both rules reflect nearly identical substance and even verbiage to the agency rule against implied delegations of principal power. Section III.C describes additional evidence from traditional statutory interpretation linking the importance of power with the clarity expected of its granting. Even if these statutory interpretation rules were not drawn from the law of agency, they

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91 *See Chickasha*, 174 F. at 929.

92 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2608–09 (2022).

93 *See* Est. of Casey v. Comm'r, 948 F.2d 895, 900 (4th Cir. 1991); Torres v. Torres, 2005 Guam 22; Townsend v. United States, 889 F. Supp. 369, 373. (D. Neb. 1995) (holding that an attorney-in-fact could not make gifts on behalf of the principal absent express authority to do so and a showing of the principal's clear intent to make such gifts).

94 *See* Spence v. Emerine, 21 N.E. 866, 867 (Ohio 1889) ("[A]n authority given by warrant of attorney to confess a judgment against the maker of the note must be clear and explicit, and strictly pursued, and we cannot supply any supposed omissions of the parties."); Bank of Marion v. Spence, 154 S.E. 488, 489 (Va. 1930).

provide independent evidence that courts traditionally considered the importance of asserted power as relevant to how clearly power had to be granted.

A. *Dillon's Rule: An Application of the Agency Rule Against Implied Delegation of Principal Powers*

Dillon's Rule, named after prominent judge and later academic John Dillon, was a doctrine barring implied delegations of principal power to municipalities. Dillon's Rule is a prime example of the agency rule against implied delegations of principal power applying to statutory interpretation—to interpreting statutes delegating power to a public agency. If this is true, then interpretation of public law delegations has long reflected something very like the MQD.

This argument has a few steps. First, municipalities were agencies of the state, so agency rules would naturally apply. Second, the substance and even verbiage of Dillon's Rule strikingly matches the agency rule against implied delegations of principal power, indicating that the agency rule was in fact applied to municipalities as agents of the state. Third, Dillon's Rule was very well established.

The first step in seeing how Dillon's Rule is a straightforward application of the agency rule against implied delegation of principal powers is that municipalities were considered agents of the state.[95] As noted earlier, administrative agencies are creatures of statute, and the founding-era agent had no authority except that granted by the principal.[96] The same was true of municipalities. As then-Judge Dillon wrote in a seminal case, "[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy."[97] In *Trenton v. New Jersey*, the Supreme Court similarly held that "municipalities have no inherent right of self-government which is beyond the legislative control of the State," but are merely "department[s] of the State," with powers and privileges such as the state has seen fit to grant, held and exercised subject to its sovereign will.[98] Since municipalities were considered agencies, a general agency rule would naturally apply to them, just as the rule would

95 *See, e.g.*, Lucas v. Bd. of Comm'rs., 44 Ind. 524, 530–31 (1873) (saying municipalities are "a mere agency of government"); City of Logansport v. Pub. Serv. Comm'n, 177 N.E. 249, 252 (Ind. 1931) (saying a city "acts as an agency for the state").

96 *See supra* note 44 and accompanying text (establishing that agencies are creatures of statute).

97 City of Clinton v. Cedar Rapids & Mo. River. R.R. Co., 24 Iowa 455, 475 (1868).

98 Trenton v. New Jersey, 262 U.S. 182, 187 (1923); *see also* Meriwether v. Garrett, 102 U.S. 472, 511 (1880).

be applied to any agent delegated powers by formal written instruments, like a statute.

But this is not just a theoretical hypothesis. The striking similarity between Dillon's Rule and the agency rule indicates the former was in fact an application of the latter. When one consciously considers Dillon's Rule alongside the agency rule against implied delegation of principal powers, the match is hard to miss. Judge Dillon's own words highlight the parallels:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. . . . These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations. Their reasonableness, their necessity, and their salutary character have been often vindicated . . . .[99]

Compare this to Justice Story's words in describing the agency rule: "[T]he authority is never extended beyond that, which is given in terms, or is necessary and proper for carrying the authority so given into full effect."[100] Consider the identical features.

Judge Dillon: "[1] [A] municipal corporation possesses . . . the following powers, and no others: [2] First, those granted in *express words*; [3] second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted . . . ."[101]

Justice Story: "[1] [The agent's] authority is never extended beyond [2] that, which is given in terms, or [3] which is necessary and proper [i.e., incidental] for carrying the authority so given into full effect."[102]

The substance and even wording of the two rules is virtually identical. The only differences are that Justice Story's articulation is more concise and uses slightly older vocabulary. For both, only incidental powers can be implied, while other (i.e., the principal) powers must be express.

Judge Dillon's vocabulary was no outlier in articulating this rule. Black's Law Dictionary, for instance, says that Dillon's Rule dictated

99 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, § 89 (3rd ed. rev. 1881) (emphasis omitted).

100 STORY, AGENCY *supra* note 50, § 68.

101 1 DILLON, *supra* note 99, § 89 (emphasis omitted).

102 STORY, AGENCY, *supra* note 50, § 68.

that a municipality "may exercise only those powers that the state expressly grants to it, the powers necessarily and fairly implied from that grant, and the powers that are indispensable to the existence of the unit of local government."[103] Describing the rule similarly, Professor Wurman has documented that by the Civil War, "a large body of law had developed" under which "municipalities could exercise only those powers expressly delegated to them by the state legislatures, or those necessarily implied or incidental."[104] The Supreme Court adopted Dillon's Rule by 1865, holding in *Thomson v. Lee County* that a municipality "acts wholly under a delegated authority, and can exercise no power which is not in express terms, or by fair implication, conferred upon it."[105] In another case holding similarly, the Court even cited Judge Dillon's treatise.[106] J.G. Sutherland's treatise on statutory interpretation in the late nineteenth century recites the same rule. "The settled rule of construction," he writes, is that municipalities could exercise only the "powers and rights . . . *clearly comprehended within the words* of the [statute delegating power] or derived therefrom by *necessary implication.*"[107] Indeed, he says, the legislature "can delegate its just authority" *only* by such clear grants.[108] Frank Goodnow, the first president of the American Political Science Association and a prominent early administrative law scholar,[109] quoted Dillon's Rule as an "undisputed proposition of law."[110] Writing nearly fifty years earlier than Goodnow, Theodore Sedgwick's treatise on statutory interpretation stated this same rule of strictly construing delegations to municipalities.[111] In his words, "the authority conferred upon these subordinate bodies is to be strictly construed, and must be closely pursued."[112] Even earlier, in 1827, Englishman John Willcock's treatise on municipal corporations recited the

103 *Dillon's Rule*, BLACK'S LAW DICTIONARY (12th ed. 2024).

104 Wurman, *supra* note 15, at 826; *see id.* at 826–36 (canvassing these nineteenth-century cases).

105 Thomson v. Lee Cnty., 70 U.S. (3 Wall.) 327, 330 (1866).

106 Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907).

107 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 380 (Chi., Callaghan & Co. 1891) (emphasis added).

108 *Id.*

109 *See* Joseph Postell, *Does American History Legitimize the Administrative State?*, 36 REGENT U. L. REV. 321, 331 (2024); Frederic A. Ogg, *Frank Johnson Goodnow*, 34 AM. POL. SCI. REV. 114, 114 (1940).

110 FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 168–69 (1905) (quoting 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, § 89 (Bos., Little, Brown, & Co. 4th. ed. rev. 1890)).

111 SEDGWICK, *supra* note 35, at 466.

112 *Id.* at 466–67. As an example, he cites New York's rule that municipalities "shall not possess any power except such as was specially given, or as shall be necessary to the exercise of the powers so given; and these provisions are in general strictly construed." *Id.* (citation omitted).

same rule: "A statute does not by implication invest [a] body with any extraordinary authority."[113] Granting extraordinary powers required "express words to that effect."[114] Dillon's Rule was a dominant principle of statutory interpretation, and it was a straightforward application of the older agency rule.

B. The Presumption Against Implied Delegations to Early Administrative Agencies

Louis Capozzi has argued that, dating back to the "mid-nineteenth century," courts applied a "presumption against implied delegations by legislatures."[115] Interestingly, Capozzi says this rule was "seemingly borrowed" from the "analogous context" of "delegations from state governments to municipalities" governed by Dillon's Rule.[116] If Capozzi is correct, and if Dillon's Rule is an expression of the agency rule against implied delegation of principal powers, then this presumption against delegations was also an application of the original agency rule.

A few representative statements of the rule Capozzi identified suffice to make the point of how similar this rule was to the agency rule and to the MQD. For example, Sutherland's treatise described a rule that "[a]s the possessor of the law-making power, [the legislature] may confer authority and impose duties upon the [other branches of government] . . . *giving them expressly or by necessary implication an incidental discretion* to employ the proper means to fill up and regulate the details for themselves and subordinates."[117] In so describing the manner in which Congress may permissibly delegate power, Sutherland can be read as drawing the line exactly the same way the agency rule drew the line. Indeed, Sutherland's words seem to be almost a paraphrasing of the agency rule. Congress, Sutherland says, must delegate "*expressly*," with the exception that "*incidental*" power can be implied as "proper means" to carry out expressly given powers.[118] Depending on how one parses the grammar, Sutherland could alternatively be saying that incidental discretion may be granted either expressly or by necessary implication, whereas principal power cannot be delegated *at all.* Sutherland makes no mention of principal powers and never says principal

113 J.W. WILLCOCK, THE LAW OF MUNICIPAL CORPORATIONS 99 (Lond., William Benning 1827).

114 *Id.*

115 *See supra* notes 12 & 13 and accompanying text; Capozzi, *Past and Future*, *supra* note 11, at 197–208 (surveying the caselaw applying this presumption).

116 *See supra* note 15 (citing Capozzi).

117 SUTHERLAND, *supra* note 107, § 68 (emphasis added).

118 *Id.* (emphasis added).

powers *can* be given expressly. If that were true, then the MQD would be irrelevant, because nothing major could permissibly be delegated to agencies in any case, at least insofar as the category of "major" and "principal" overlapped. But either way, Sutherland's statement of the rule certainly excludes that principal or major powers could be delegated *implicitly*.

In another place, Sutherland similarly mirrors Justice Story's articulation of the rule allowing implicit delegation of incidental powers but not of principal power. Sutherland writes, "[t]he grant of an express power [by statute] carries with it by necessary implication every other power necessary and proper to the execution of the power expressly granted."[119] This is an almost exact restatement of Justice Story's articulation: "[T]he authority is never extended beyond that[] which is given in terms[] or is necessary and proper for carrying the authority so given into full effect."[120]

Goodnow echoed this rule in his 1905 administrative law treatise. In Goodnow's words, "the general rule in this country is that the administrative authorities . . . may issue ordinances only where the power to issue such ordinances has been expressly given to them by the legislature."[121] To be sure, both Sutherland and Goodnow wrote a century after the founding, so further research is necessary to see if this rule was recognized earlier as applying in statutory interpretation. But the mere fact that Goodnow recognized this rule indicates the rule was not ill-established or recently invented, for Goodnow was a staunch early progressive who advocated empowering administrative officers to bring their expertise to bear on public affairs free from too much constraint from politics.[122] In his view, politics would "pollute" and "produce corruption" in administrative work.[123] A rule that limited how power could be delegated is thus probably not something he would have affirmed unless it was clearly established.

At minimum, this is evidence that, even apart from Dillon's Rule, the agency rule against implied delegation of principal powers (or a very nearly identical rule) operated in statutory interpretation. If it did,

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119 *Id.* § 341.

120 STORY, AGENCY *supra* note 50, § 68.

121 GOODNOW, *supra* note 110, at 326–27.

122 *See* FRANK J. GOODNOW, POLITICS AND ADMINISTRATION 39 (1900) (saying that "the most progressive political communities have felt obliged to take a long step toward securing the independence of certain of the authorities intrusted with the administration of the law"); *see also* Ronald J. Pestritto & William J. Atto, *Introduction to American Progressivism*, *in* AMERICAN PROGRESSIVISM 1, 18–21 (Ronald J. Pestritto and William J. Atto eds., 2008) (describing how early progressives like Goodnow wished "to shield administrative agencies from political influence, so that administrators could be free to make policy on the basis of their expertise," *id.* at 18).

123 *See* GOODNOW, *supra* note 122, at 82.

then administrative agencies asserting principal power would need express authorization by Congress. This strongly indicates historical precedent for the MQD's requirement of clear authorization for major powers.

C. Other Traditional Public Law Interpretive Principles Linking Importance and Clarity

In addition to Dillon's Rule and the more general presumption against implied delegations that Capozzi identified, traditional public law interpretation contains a good deal more evidence that interpreters expected important and dangerous powers to be granted clearly. For example, Justice Story's canonical commentary on the Constitution advocated narrowly reading a delegation of power for an especially dangerous power—taking away vested property rights. In his words, the power to "violate" "the rights of personal liberty, and private property" is "so repugnant to the common principles of justice and civil liberty" that courts should resist finding that such a power "lurked under any general grant of legislative authority."[124] This power, he says, should not "be implied from any general expression . . . in the usual forms of the constitutional delegation of power" because "[t]he people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and positive declarations to that effect."[125] Justice Story's discussion here at least suggests a principle that if a power is dangerous enough, courts can and must require clear authorization before giving effect to that power. It is possible that this clear statement rule was cabined to the unique issue of derogating vested property rights. Even if so, it shows that requiring heightened clarity for delegating dangerous powers is by no means a novel principle in American public law. But this principle about dangerous power does not appear to have been limited to that one subject. As Professors William Baude, Jud Campbell and Stephen E. Sachs have recently argued, in the mid-nineteenth century "a generic grant of legislative power in a state constitution would be read narrowly" to avoid derogating a broader category of "general fundamental rights."[126]

Sutherland's statutory interpretation treatise also seems to declare that this principle about dangerous power has broader reach than merely derogation of vested property rights. "It is a principle in the construction of statutes," he writes, "that the legislature does not

124 1 STORY, *supra* note 35, § 1399. Story seems to be drawing this from *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829).

125 *Id.* at 261–62.

126 William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1201 (2024).

intend the infliction of punishment, or to interfere with the liberty or rights of the citizen, or to grant *exceptional powers* . . . by doubtful language; but will in such cases *express itself clearly*, and intends no more than it so expresses."[127] Elsewhere, he states that statutes "interfer[ing] with legitimate industries or the ordinary uses of property . . . are treated with a conservative regard for the liberty of the citizen in his laudable business . . . and generally the rights of property."[128] "Such interferences" will be given effect, he concludes, only "under valid statutes *plainly expressing* the intent" to make such interferences.[129] He goes on to say that statutes "which impose burdens" or create or increase liability "will be strictly construed."[130] As a general matter, he states, statutes to be strictly construed "are not to be regarded as including anything . . . which is not *clearly* and intelligibly described in the very words of the statute."[131] But he states a fascinating caveat that strict construction "varies in degree of strictness according to the character of the law under construction."[132] He goes on: "The construction will be more or less strict according to the *gravity of the consequences flowing from the operation of the statute* or its infraction; if . . . capable of being employed oppressively, the extent and nature of the innovation and the consequences."[133] This links the clarity required of statutory language to the magnitude of possible negative consequences—one apt way of describing dangerousness or importance.

This evidence, standing alone, might not justify a generalized "importance canon," especially a clear-statement-rule importance canon for *any and every* power that is important or dangerous. But this is evidence that the importance and dangerousness of a power was relevant to how much clarity courts required for legislatures to delegate that power. Indeed, Sutherland's language describes a rather strong clarity requirement, sounding like a substantive canon clear statement rule.[134] If nothing else, this could support something of a disaggregated MQD—requiring clear statements for particular categories of powers that were historically recognized as requiring clarity because they were so consequential.

127 SUTHERLAND, *supra* note 107, § 350 (emphasis added).
128 *Id.* § 370.
129 *Id.* (emphasis added).
130 *Id.* § 371, § 390.
131 *Id.* § 348 (emphasis added).
132 *Id.* § 347.
133 *Id.* (emphasis added).
134 *See id.* § 347.

CONCLUSION

This Note cautions that scholars should not so quickly assume that the substance of the MQD—requiring clear authorization for delegating major powers—was recently made up. The historical evidence surveyed indicates that the MQD reflects deep-seated principles in American law requiring clarity for delegations of important power. Early American agency law required express authorization for delegation of principal powers in formal written instruments. Dangerous powers seemed especially likely to be treated as principal powers. Evidence further indicates that this agency rule was applied to public agency relationships, such that statutes delegating principal power had to be express. Even if these statutory interpretation rules were not drawn from the law of agency, they provide independent evidence that courts traditionally considered the importance of asserted power as relevant to how clearly that power had to be granted. The substance of the MQD is not novel in American legal history.